No. 76-1403

In the Supreme Court of the United States

OCTOBER TERM, 1977

NELSON BUNKER HUNT, ET AL., PETITIONERS

v.

MOBIL OIL CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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CITATIONS

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

QUESTION PRESENTED

The United States will discuss the following question:

Whether the act of state doctrine prevents the courts of the United States from adjudicating the third claim of petitioners' complaint (Pet. App. E, pp. 82a-83a), which alleges generally that respondents unlawfully combined and conspired to prevent petitioners from "reaching any agreement with the

Libyan government inconsistent with [respondents'] competitive advantage," "manipulated the course of Libyan negotiations so as to advance their own interests in the Persian Gulf, and followed a course of action that led to [petitioners'] nationalization and elimination from the production of Libyan crude oil."

STATEMENT

Petitioners and most of respondents were producers of crude oil in Libya. As a consequence of certain hostile statements and actions of the Libyan government, petitioners and respondents met in New York in January 1971 to develop a unified response to future efforts by the Libyan government to increase its financial share of oil production in that country. As a result of those meetings, the parties entered into a Libyan Producers Agreement (Pet. App. E, pp. 87a–106a), which in essence prohibited any party from making any agreement with Libya without the assent of the others, provided that any party whose production was reduced by Libya would be reimbursed by the other parties, and contained other restrictions and requirements.[1]

Petitioners allege that they complied with the Agreement and its subsequent amendments but that

[1] The Agreement and its subsequent amendments were submitted to the Department of Justice; on the basis of the parties' representations that the agreement was a necessary means by which to protect themselves and United States' consumers from the monopoly power of Libya and other oil producing countries, the Department issued a statement under its Business Review Procedures, 28 C.F.R. 50.8, that it did not intend to challenge the agreement as a violation of the antitrust laws.

respondents did not. In particular, petitioners allege that by mid-1972 Libya's demands of petitioners had become increasingly insistent and ominous, but that respondents, wishing to prevent petitioners' capitulation in Libya before they successfully negotiated agreements with the Persian Gulf states, gave petitioners false assurances to induce them to stand fast. Petitioners allege that, in reliance on those assurances, they refused Libya's demands and, as a result, Libya terminated petitioners' export rights in December 1972, terminated their right to produce oil in May 1973, and nationalized all petitioners' Libyan property in June 1973. See Pet. App. E, pp. 71a–76a.

Petitioners allege that thereafter respondents, by concerted action and for the purpose of eliminating petitioners as competitors, breached their obligations to petitioners under the Agreement and imposed anticompetitive restrictions on the sale of the oil that petitioners did receive as compensation from them under the Agreement (Pet. App. E, pp. 76a–77a).

Petitioners filed a complaint against respondents in the United States District Court for the Southern District of New York, alleging that certain restrictions in the Agreement concerning the sale of oil received by petitioners violated the Sherman Act and the Wilson Tariff Act (First Claim; Pet. App. E, pp. 78a–81a); that respondents' concerted refusal to supply petitioners with oil under the Agreement violated the Sherman Act and the Wilson Tariff Act (Second Claim; Pet. App. E, pp. 81a–82a); that respondents "manipulated the course of Libyan negotiations * * *

and followed a course of action that led to [petitioners'] nationalization and elimination from the production of Libyan crude oil" in violation of the Sherman Act and Wilson Tariff Act (Third Claim; Pet. App. E, pp. 82a–83a); and that respondents breached their contractual obligations under the Agreement (Fourth Claim, Pet. App. E, pp. 83a–84a).

Respondents moved to dismiss all four claims (Pet. App. B, pp. 28a–29a). The district court denied the motion as to the first, second and fourth claims. The court, however, granted the motion with respect to the third claim on the ground that it "would require inquiry into the acts and conduct of Libyan officials, Libyan affairs and Libyan policies" (Pet. App. B, p. 49a) and that such an inquiry is precluded by the act of state doctrine (Pet. App. B, pp. 47a–51a). The court entered a final judgment dismissing the claim under Fed. R. Civ. P. 54(b). The court of appeals affirmed (Pet. App. A). The court reasoned that the complaint necessarily would require inquiry into the motivations of the Libyan government, that such an inquiry inevitably would call into question the validity of that government's action, and that any challenge to the validity of the Libyan action is precluded by the act of state doctrine (Pet. App. A, pp. 18a–21a).

INTRODUCTION AND SUMMARY

We believe that the Court should grant the petition for a writ of certiorari. The third claim of petitioners' complaint raises difficult and important questions concerning the reach of the act of state doctrine

generally and its application to the antitrust laws in particular that warrant this Court's review. In view of the increasing involvement of foreign governments in various types of economic activities, the opinion below may have a significantly adverse effect on both governmental and private enforcement of the antitrust laws against corporations engaged in international business transactions.

A determination of the bearing of the act of state doctrine on this case requires at the outset an analysis of the theory of the third claim of the complaint (Pet. App. E, pp. 82a–83a). That analysis is difficult at the present stage of this litigation in view of the absence of any record evidence expliciting that theory.[2] Indeed, petitioners' own explanation of the theory of their third claim does not appear

[2] One of the difficulties in understanding the complaint in the absence of evidence concerns the relationship between the third claim and the first, second and fourth claims, which were not dismissed. From petitioners' explanation of the facts it would appear that their injury resulted not from the expropriation *per se* but from the expropriation and respondents' subsequent alleged breach of their contractual obligations to petitioners under the Libyan Producers Agreement, which respondents allegedly conspired to breach for anticompetitive reasons, and from anticompetitive requirements that the Agreement imposed on petitioners (Pet. 6–11). The alleged breach of contract, concerted refusals to deal, and imposition of anticompetitive terms are separately alleged in the first, second and fourth claims, however, and the expropriation is a necessary precondition of each. It is difficult to see, therefore, to what extent the third claim does not merely restate the claims that have not been dismissed. The answer may depend on the development of evidence.

These difficulties illustrate the wisdom of the principle, reaffirmed by this Court last Term, that, particularly in antitrust cases,

entirely consistent (see Pet. 6–11, 22–24). However, the essential theory of that claim appears to be that petitioners' property was expropriated by Libya *because* petitioners were induced by respondents, who in turn were motivated by undisclosed anticompetitive purposes, to refuse to negotiate.[3] In other words, in order to prove their claim, petitioners apparently will be required to prove, *inter alia,* that their failure to negotiate, and not other factors, was the proximate cause of their expropriation.[4] Accordingly, the

"dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738, 746.

[3] See Pet. 6–11. Thus petitioners state: "Hunt faithfully performed its side of the bargain; it rejected Libya's demands—despite Libya's tempting offer of special considerations were Hunt the first to agree to 51 per cent participation. And Hunt paid the price of fidelity; in the spring of 1973 it was first shut in and later nationalized" (Pet. 11).

But later petitioners seem to place different and somewhat inconsistent constructions on the complaint. They assert that "[respondents' efforts to disadvantage petitioners] was achieved long before the Libyan government nationalized Hunt on June 11, 1973" (Pet. 22); that "[respondents'] aims * * * were largely achieved whether or not the Libyan government ever nationalized Hunt—which came as an added bonus" (Pet. 23); and that "if Hunt, relying upon [respondents'] assurances, did take positions which led to its nationalization, it matters not what the motivation of the Libyan government was or what the Libyan government would have done in other circumstances" (Pet. 24). This latter statement in particular seems to be a contradiction in terms. Since petitioners must prove that the positions they took "led" to their nationalization, the motives of the Libyan government in nationalizing them is directly relevant to their claim.

[4] Thus petitioners appear to be inaccurate in analogizing the third claim to a conspiracy among certain parties to eliminate a competitor by persuading him to sleep in a street where they anticipate the passage of a mail truck by falsely representing to him

court of appeals and the district court appear correct in their observation that proof on the third claim necessarily would require judicial examination into the motives of the Libyan government in expropriating petitioners' property.

At the threshold, therefore, this case presents the important issue whether the act of state doctrine bars judicial examination of the motives behind a foreign government's official acts. We submit that it does not. While judicial examination of such motives raises some of the concerns underlying the act of state doctrine, that doctrine only precludes judicial examination of the validity or legality of such acts under appropriate legal principles. Petitioners' third claim does not require any inquiry into the validity of the Libyan government's act in any way that implicates the act of state doctrine.[5]

DISCUSSION

This Court's articulation of the act of state doctrine has consistently described it as a doctrine that "precludes the courts of this country from inquiring into the *validity* of the public acts [of] a recognized for-

that the street will be closed to traffic (Pet. 24). Such a case does not involve action by the victim that prompts the instrument of the injury to do the injury, and a complaint arising out of that hypothetical set of facts would not require proof of the mail truck driver's motives in taking one route rather than another, or no route at all. Petitioners' third claim, however, appears to require proof that the Libyan government would not have taken the action it took against petitioners if they had not refused to negotiate.

[5] We express no view on petitioners' ability to prove the third claim at trial or on any factual or other legal defenses respondents might raise.

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eign sovereign committed within its own territory." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 401 (emphasis supplied). See also *Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682, 697 (plurality opinion of Mr. Justice White); *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 767 (plurality opinion of Mr. Justice Rehnquist).[8] In every recent case in which the act of state doctrine has been recognized to bar a claim, the claim itself was based on the contention that the act of the foreign sovereign was invalid or unlawful under some allegedly governing legal standard.

The Court has identified two related considerations underlying the doctrine: (1) the absence of settled or ascertainable legal standards by which the validity of a foreign state's public act may be measured; and (2) the risk that a judicial declaration of the validity or invalidity of the act of a foreign state may conflict with the positions of the political branches on the matter and thus interfere with or embarrass the conduct of foreign relations by those branches. See *Banco Nacional de Cuba* v. *Sabbatino*, *supra*, 376 U.S. at 423; *First National City Bank* v. *Banco Nacional de Cuba*, *supra*, 406 U.S. at 765–768 (plurality opinion), 788 (dissenting opinion of Mr. Justice Brennan).

Even when those considerations are present, they may not preclude adjudication of the case. The Court has made clear that the act of state doctrine rests on

[8] See also ALI, *Restatement* (*Second*), *Foreign Relations Law of the United States* § 41 (1965): "A court in the United States • • • will refrain from examining the *validity* of an act of a foreign state by which that state has exercised its jurisdiction to give effect to its public interests" (emphasis supplied).

principles of judicial abstension rather than on jurisdictional or constitutional commands, and that it thus constitutes a limited exception to the ordinary obligation of courts to adjudicate cases and controversies over which they have jurisdiction. *The Paquete Habana*, 175 U.S. 677; *First National City Bank* v. *Banco Nacional de Cuba*, *supra*, 406 U.S. at 763 (plurality opinion). The Court therefore has concluded that the doctrine should be applied in a flexible fashion, in recognition of the fact that the capacity of courts to resolve certain issues and the risk of embarrassment or interference with the conduct of foreign relations vary according to the issues and circumstances presented in each case. See *Banco Nacional de Cuba* v. *Sabbatino*, *supra*, 376 U.S. at 428; *First National City Bank* v. *Banco Nacional de Cuba*, *supra*, 406 U.S. at 763 (plurality opinion).

It may be that an inquiry into the motives of the Libyan government's act of expropriation would have the potential of embarrassing that government and of affecting our government's conduct of foreign relations. Petitioners' may offer proof amplifying, or even possibly contradicting official governmental explanations.[7] In turn, respondents would have the right to offer their own version of the reasons for the Libyan act.[8] But although the existence of a potential for em-

[7] It appears that both the Libyan government and the United States government explained the nationalization of petitioners' property simply as an act of political reprisal against the interests of the United States and its citizens (Pet. App. A, p. 10a).

[8] Unlikely as it might appear, respondents might attempt to prove that the expropriation was in fact motivated, for example, by petitioners' failure to comply with Libyan safety regulations, or by personal animosity against petitioners.

barrassment counsels caution, it does not, standing alone, implicate the act of state doctrine or otherwise require the courts to abstain from adjudicating the dispute.

None of this Court's decisions suggest that the act of state doctrine precludes all lines of investigation that may embarrass a foreign state or affect the political branches' conduct of foreign relations. Rather, the act of state doctrine rests upon the need to avoid the particular embarrassment, and the specific interference with the conduct of foreign affairs, that may be presumed to result from a judicial determination that a foreign sovereign's act was illegal under either domestic law or the legal standards of the international community. A judicial inquiry into the motivation for a foreign sovereign's act would not require a court to rule upon the legality of that act; a finding concerning motive would not entail the particular kind of harm the act of state doctrine is designed to avoid.[9] To dismiss a complaint before the development of evidence, merely because adjudication raises the possibility of embarrassment, constitutes an unwarranted expansion of the act of state doctrine and is contrary to the flexibility with which that doctrine should be applied.[10]

[9] In many ordinary tort or contract cases, it may be open to the defendant to allege and offer proof that the proximate cause of the plaintiff's injury was the act, not of the defendant, but of a foreign sovereign.

[10] A complaint that requires proof of the motives underlying a foreign government's act may raise substantial problems of proof. See Pet. App. A, p. 19a. Cf. Fed. R. Civ. P. 44.1. But the possibility of such problems is not a sufficient reason to prevent the plaintiff from trying. As this Court noted in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 697, 701, the jury must be permitted to draw appropriate inferences concerning causation from the circumstantial evidence presented.

The court of appeals, however, was of the view that inquiry into the "motivation of the Libyan action • • • inevitably involves its validity" (Pet. App. A, p. 18a), and it concluded that "we cannot logically separate Libya's motivation from the validity of its seizure" (*id.* at 18a–19a). We disagree. At trial, either petitioners will prove (or fail to prove) that they were expropriated because they refused to negotiate or respondents will prove that petitioners were expropriated for some other reason. Adjudication of those factual issues will not require the court to rule upon the validity or legality of the act of expropriation.

The courts below relied upon *American Banana Company* v. *United Fruit Company*, 213 U.S. 347, where the Court, in an opinion by Mr. Justice Holmes, upheld the dismissal of an antitrust complaint that alleged that the defendant had instigated the government of Costa Rica to seize the plaintiff's property for the purpose of eliminating it as a competitor. The Court first held that the antitrust laws do not reach conduct outside the United States (213 U.S. at 357), a holding that the court of appeals below recognized to have been rejected by subsequent decisions of this Court (Pet. App. A, p. 12a). See *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 704.

The *American Banana* opinion, however, went on to rely on act of state principles as well (213 U.S. at 358):

> [I]t is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts cannot, admit that the influences were improper or the results bad. It makes the persuasion lawful by its own act.

The present case, however, differs from *American Banana,* in that here the complaint does not allege that respondents persuaded or instigated the foreign sovereign to act, and perhaps could be distinguished on that ground alone. But it is difficult to see why the validity of the Costa Rican action was any more relevant to the complaint in *American Banana* than the Libyan government's action is to the complaint in this case. The presumed lawfulness of the Costa Rican action should not have shielded the defendant's efforts to bring it about from inquiry under the antitrust laws, unless the act of state doctrine serves to insulate from antitrust liability any efforts by private persons designed to bring about an act of a foreign state injurious to a competitor.

Such an expansive construction of the act of state doctrine seems inconsistent with subsequent decisions

of this Court.[11] Thus in *United States* v. *Sisal Sales Corp.*, 274 U.S. 268, the Court upheld a complaint that alleged that the defendants had conspired to monopolize and restrain trade in sisal by, *inter alia,* securing favorable legislation in Mexico.[12]

Following *Sisal Sales,* the Court in *Continental Ore Co.* v. *Union Carbide & Carbon Corp., supra,* upheld

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[11] Moreover, such a construction apparently would confer antitrust immunity on acts by private defendants in violation of the law of foreign state (*e.g.*, procuring governmental acts by bribery). It would also confer antitrust immunity on acts of a kind that would not be so immune if the governmental act in question were that of the United States or one of its agencies or officers, since successful efforts by private parties to bring about domestic governmental acts are not automatically immune from antitrust liability. See *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579; *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508; *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439; note 13, *infra.*

[12] The Court purported to distinguish *American Banana* on the ground that the acts complained of there had occurred within a foreign state, whereas the conspiracy alleged in *Sisal Sales* was entered into and made effective by acts done in the United States. However, the rationale of the act of state doctrine does not depend on the situs of the conspiracy or of the acts of private defendants. In some cases, the *threshold* question of whether foreign rather than American law governs a case depends on the locus of the private acts or the predominant jurisdictional contacts of the transactions, and in such cases, the jurisdictional contacts may be relevant to whether the act of state doctrine is implicated at all. But since American antitrust law is now understood as having extraterritorial application, in antitrust cases the locus of the defendants' acts does not determine which sovereign's law applies and thus would seem largely irrelevant to concerns relating to act of state principles.

an antitrust complaint that alleged that the defendants had conspired to establish a customer allocation program for sales of vanadium in Canada that had been instituted and controlled by an agent of the Canadian government and that excluded the plaintiff from the market. The Court stated (370 U.S. at 706):

> [W]hat the petitioners here contend is that the respondents are liable for actions which they themselves jointly took, as part of their unlawful conspiracy, to influence or to direct the elimination of Continental [Ore] from the Canadian market. As in *Sisal,* the conspiracy was laid in the United States, was effectuated both here and abroad, and respondents are not insulated by the fact that their conspiracy involved some acts by the agent of a foreign government.

The rationale of *American Banana* thus appears to have been rejected by subsequent decisions of this Court. Nevertheless, this Court never has explicitly so stated and, as the court of appeals noted, this Court cited *American Banana* in *Banco Nacional de Cuba* v. *Sabbatino, supra,* 376 U.S. at 416, as a case "directly or peripherally" involving the act of state doctrine.[13] Accordingly, this case warrants review to

[13] The apparent inconsistency between *American Banana* and subsequent cases has created some uncertainty among the lower courts. In *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal.), affirmed, 461 F. 2d 1261 (C.A. 9), certiorari denied, 409 U.S. 950, the court, relying on *American Banana*, dismissed an antitrust complaint that alleged, *inter alia*, that the defendants had induced one sovereign to assert dominion over territory within a concession awarded to plantiff by another sovereign. In *Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F. 2d 597 (C.A. 9), however, the court upheld a complaint that alleged, *inter alia*, that the defendants had used Honduran judicial process for anticompetitive purposes to injure the plaintiff.

The controversy between the parties in the *Occidental Petroleum* case subsequently arose in the courts of the United Kingdom, and the judges of the Court of Appeal, Civil Division, came to a conclusion contrary to the Ninth Circuit's in that case concerning the application of the act of state doctrine, in well-reasoned opinions that analyzed, correctly in our view, the distinctions between the act of state doctrine and other related doctrines. *Buttes Gas and Oil Co.* v. *Hammer*, [1975] 2 All E.R. 51.

clarify the scope of the act of state doctrine.[14]

[14] When, as here, the complaint in a private antitrust action will not require a court to determine the validity of a foreign state's act that the defendant is alleged to have brought about, we believe that the appropriate analysis is not under the act of state doctrine but under state-action doctrines developed in decisions under the antitrust laws. The application of those doctrines to acts of foreign states is not firmly settled, but it would not appear that petitioners' third claim in this case would come within those doctrines in any event.

Petitioners' complaint on its face does not establish that respondents' alleged conduct was under the compulsion of foreign law (cf. *Parker* v. *Brown*, 317 U.S. 341) or constituted a legitimate effort to persuade a foreign government to adopt certain measures (see *Eastern Railroads Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127; *United Mine Workers of America* v. *Pennington*, 381 U.S. 657). If respondents seek the benefits of state-action doctrines (and to avoid their limitations, see cases cited in note 11 *supra*), it is incumbent upon them to establish the necessary facts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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